Supreme Court, U. S.
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No. 79-1336

In the
# Supreme Court of the United States

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

*Petitioner,*

*vs.*

KALO BRICK & TILE COMPANY,

*Respondent.*

## JOINT APPENDIX

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## JOINT APPENDIX

### I. PLEADINGS AND MOTIONS

#### PETITION

COMES NOW the Plaintiff and for its cause of action states:

1. That it is an Iowa Corporation with its principal place of business at Fort Dodge, Iowa.

2. That the Defendant is a railroad operating in Webster County, Iowa, which is now known as the Chicago and Northwestern Transportation Company which succeeded to all of the rights and liabilities of the Chicago and Northwestern Railway Company. That the Defendant, Jack Chmeler, is and was an agent for the Chicago and Northwestern Transportation Company, and its predecessor at Fort Dodge, Iowa, and Kalo, Iowa, and he and his predecessor agents have been in charge of the operation of the business of the Chicago and Northwestern Transportation Company and its predecessor at all times material hereto.

3. Until April of 1973 the Plaintiff operated a manufacturing plant at Kalo, Webster County, Iowa, where it made clay products for sale and shipment by railroad to different parts of the United States where it had sold its products and the Plaintiff had been so engaged in the manufacture of clay products for more than 50 years. That in connection with the operation of its business, the Plaintiff hired employees, some of whom worked in the Plaintiff's business office in Fort Dodge, Iowa, and others at its plant in Kalo, Iowa.

4. That the Defendants operated as a railroad common carrier in Webster County, Iowa, and in particular a line from Fort Dodge, Iowa, to Kalo, Iowa, and to the Plaintiff's plant. That for many years, the foregoing line of

track was operated by the Defendants and its predecessors. That for many years the Plaintiff shipped its manufactured products over the Defendants' line and built up its business on the basis of the railroad service that was available until April of 1973.

5. That prior to April of 1973, the Defendants have railroad services to the Plaintiff and after April of 1973 the Defendants failed and refused to give service to the Plaintiff or to furnish it any railway cars or to send trains to the Plaintiff's plant at Kalo, Iowa, which is located immediately adjacent to the tracks of the Defendants. The Plaintiff made repeated requests for service and for cars to the Defendant, its agents, and in particular, its agent the Defendant, Jack Chemler. That the said Defendants failed and refused to perform the common law and statutory duties of a common carrier of freight and in particular their duties to the Plaintiff; and that as a result, it was impossible for the Plaintiff to continue the operation of its business and it was forced to discontinue the operation of its business and it was forced to discontinue its business and to dispose of its manufacturing equipment and property at a substantial loss; that as a result, the Plaintiff was forced to give up its business resulting in substantial damages to it. That as a result of the Defendants' failure and refusal to operate as a common carrier and to perform its duty to the Plaintiff as such, the Plaintiff has been damaged in the sum of not less than $350,000.00.

WHEREFORE, Plaintiff PRAYS for judgment against the Defendants in the sum of $350,000.00 and for costs.

## AMENDMENT TO PETITION

COMES NOW the Plaintiff and for its Amendment to the Petition heretofore filed states as follows:

## DIVISION II

1. That it realleges and incorporates herein by this reference paragraph 1 of Division I, the original Petition filed herein.

2. That the Defendant, Chicago & Northwestern Transportation Company, is a railroad operating in Webster County, Iowa, which is now known as the Chicago & Northwestern Transportation Company which succeeded to all rights and liabilities of the Chicago & Northwestern Railway Company.

3. That it realleges and incorporates herein by this reference paragraph 3 of Division I, its original Petition herein.

4. That it realleges and incorporates herein by this reference paragraph 4 of Division I, its original Petition herein.

5. During the early 1960's, the exact date of which is not known to this Plaintiff, the Defendants succeeded in interest to the rights, obligations and liabilities of the Minneapolis and St. Louis Railroad Company and began to operate its trains over the track referred to in Division I of this Petition.

6. From that period forth until April of 1973, the Defendants failed to maintain the track in a proper manner, neglected and refused to make switches (delivery of cars on order) on a regular basis, and from time to time delivered cars to the Plaintiff which were unsuitable for use by reason of being dirty, broken and unroadworthy.

7. In addition thereto the Defendants failed and neglected to properly maintain the railroad right-of-way in that the Defendants and its agents permitted water to accumulate on the west side thereof which accumulation of water weakened the railroad bed and caused it to fail.

8. As a result of the Defendants' failure to exercise reasonable care in maintaining the railroad bed, in April of 1973 the track failed and the Defendants were no longer able to provide service to this Plaintiff as required by the laws and statutes of the State of Iowa.

9. That the negligence of the Defendants, its agents and employees was the proximate cause of the Plaintiff's injuries as hereinafter set forth.

10. That as a result of the Defendants' negligence aforesaid, the Plaintiff was forced to close its business because it was unable to find another economical means of transportation to transport its products and the negligence of the Defendants was the proximate cause of the Plaintiff's injuries.

11. That prior to 1973 the Plaintiff's company was a viable, existing company engaged in the manufacture of clay brick, was without debt and as a result of the Defendants' negligence, the Plaintiff was forced to close and as a proximate cause thereof was damaged in the amount of $350,000.00. That the Plaintiff alleges that said neglect of its duty to the Plaintiff was a part of a general overall scheme on behalf of the Defendants to close "unproductive" lines and that by reason thereof said neglect was malicious and was for the purpose of forcing the Plaintiff out of business.

WHEREFORE, the Plaintiff PRAYS for judgment against the Defendants in Division II herein in the amount of $150,000.00 and further PRAYS for punitive damages in the amount of $150,000.00 together with interest and costs of this action.

## DIVISION III

The Plaintiff for Division III of its Petition states:

1. That it realleges and incorporates herein by this reference paragraph 1 of Division II.

2. That it realleges and incorporates herein by this reference paragraph 2 of Division II.

3. That it realleges and incorporates herein by this reference paragraph 3 of Division II.

4. That it realleges and incorporates herein by this reference paragraph 4 of Division II.

5. That it realleges and incorporates herein by this reference paragraph 5 of Division II.

6. That it realleges and incorporates herein by this reference paragraph 6 of Division II.

7. That it realleges and incorporates herein by this reference paragraph 7 of Division II.

8. That it realleges and incorporates herein by this reference paragraph 8 of Division II.

9. That during said period of time, and at all times material hereto, it was the avowed and publicized purpose of the Defendants to close all unproductive lines under its control.

10. That, at all times material, the Plaintiff had existing business relations and contacts with distribution of its products in Illinois, Minnesota, Michigan, North Dakota and Nebraska; that the acts of the Defendants were such as to substantially interfere with Plaintiff's existing and future contracts.

That as a result of Defendants' acts of interference with Plaintiff's contracts, the Plaintiff was damaged in the amount of $100,000.00.

WHEREFORE, the Plaintiff PRAYS for judgment in the amount of $100,000.00 in Division III hereof, together with interest and costs of this action.

## II. TRANSCRIPT OF TESTIMONY

(October 19, 20, 21, 22 and 26, 1976)

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### JERRY KILIPER

### DIRECT EXAMINATION

BY MR. BLACKBURN:

Q. Would you state your name, please? A. Jerry Kiliper.

• • •

(Tr. p. 7)

• • •

Q. What is your education, sir? A. I graduated from Iowa State University with a Bachelor of Science in Engineering.

• • •

Q. Now, are you an officer in the Kalo Brick and Tile Company? A. Yes, I am. I am president.

Q. And you hold any other official title? A. General manager.

(Tr. p. 8)

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(Tr. p. 19)

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Q. Are you familiar with the competitive nature of the brick industry? A. Yes. It is a very competitive industry. It is predicated on normally an F.O.B. site price in most cases, and, of course, the larger areas and the larger projects are a lot more competitive than the smaller projects and I am talking about a smaller project very possibly somebody putting a thousand brick on a front of a home. This would not be very competitive, but you start talking about a project that could take in excess of three to five million brick over a period of time, this is a competitive type project.

• • •

(Tr. p. 20)

Q. How would the freight rate effect your ability to be competitive in the market? A. Well, of course, we sold our product as I stated previously on an F.O.B. plant basis and the distributor was paying the freight or transportation charges and, of course, he was looking at the total on site price of the product because this is a price, its cost, he had to use to enable him to sell the product. And, of course, if this price would become far out of line, it was a good chance he would not sell this product and another product of a more competitive nature could be used.

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(Tr. p. 25)

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MR. BLACKBURN: Q. Mr. Kiliper, what was the method of transportation used by the Kalo Brick and Tile Company from the date of its inception in 1888 or 1890 to April of 1973?

THE WITNESS: A. We used the rail service as a method of transportation.

Q. And by whom was that rail service supplied? A. Well, originally it was supplied by the Minneapolis-St. Louis Railroad. Later years it was supplied by the Chicago Northwestern Transportation Company which took over the M & St. L Railroad.

• • •

(Tr. p. 28)

MR. BLACKBURN: Q. What kind of service did you get from the M & St. L?

(Tr. p. 29)

A. Service from Minneapolis-St. Paul—or M & St. L was excellent. They switched us. In other words, provided us empty boxcars and took out our loaded cars each evening after working hours.

Q. And that was up till approximately what period of time? A. Up until—I don't know the exact date. Up until the Chicago & Northwestern acquired the assets of the Minneapolis-St. Louis Railroad.

Q. And describe then in a general way how the — what kind of service you got off the Chicago & Northwestern after they took over the line? A. Well, the Chicago & Northwestern—after the Chicago & Northwestern took over the line, service started to deteriorate. The evening switches were no longer in effect. They stated they would switch us during our working hours at the noon period and in all sincerity did they get there at noon. It was anytime from nine o'clock in the morning until five o'clock in the afternoon and maybe not at all. And I must say that the service was nearly—not nearly as good with the Chicago & Northwestern as it was with the M & St. L previously.

Q. Now, what, can you describe in a general way the kind of cars that you received from the Chicago & Northwestern? A. Well, of course, we would order cars for loading of clay products in them and the cars to be designated for clay products loading, they

(Tr. p. 30)

were rough boxcars. But, some of the cars we got had holes in the bottom, tankage in them. They were filthy dirty and we did everything in our power to clean these cars up and make them suitable for loading. In fact, in some cases we had to nail pieces of metal over the floors of the cars to make them suitable to carry the product.

Q. • • • During one of the latter years of the 1960's was service curtailed for a period of time? A. Yes, and I can't recollect exact dates, but I could look it up and come up with these dates, but in the latter part of the 1960's we had a problem with service from January until May of that year.

Q. And what was the cause of that particular problem? A. Well, the railroad contended that it was a poor situation on their track at that time.

Q. What part of the track were you referring to with regard to that problem in the late '60's? A. It would be a general track condition on the entire portion of the track, but primarily was concerned with the M & St. L portion of the track.

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(Tr. p. 31)

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Q. Now, Mr. Kiliper, was the problem subsequently worked out? A. They came in and repaired the track and at that time and service was given back to us on the 30th of May of that year after many many months of negotiations and pressure put on the railroad by various people.

• • •

(Tr. p. 32)

Q. • • • From, say, May of 1968 until 1973 in April, were you familiar with or have you acquainted yourself with the volume of business that the Kalo Brick and Tile Company was giving the Chicago & Northwestern? A. Well, of course, our business was increasing. We had thought we had solved our railroad problems of the past and that things were going along. We had developed some new customers. Our volume was increasing because of the acceptance of our product and things were going along quite well during this period of time.

Q. Do you know how many cars were being shipped per year per mile about that time? A. Well, we were in excess of any regulatory amount and we were up, I guess, in the forty to fifty cars per mile range and some years above that.

Q. That's forty to fifty cars per mile per year? A. That's right.

Q. Incidentally, what was the distance of the line to the main track at Fort Dodge? A. About five and a half miles approximately.

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(Tr. p. 34)

Q. Prior to April 4th of 1973, did the people at Kalo become aware of some problems along this track particularly about where you marked it with an "x" on Defendant's Exhibit W? A. Yes, we did. We noticed some water standing in that area and we tried to open the culvert up in that area and get the water drained from the upper portion of the track.

Q. Did you see the culvert or any part of it?
(Tr. p. 35)
A. I saw the outfall.

• • •

Q. Did you see a culvert under the track? A. I saw the outfall into the culvert.
Q. And did any of the people from Kalo try to drain that culvert or drain that water which— A. We tried to pump the water over the top of the track to drain the uphill side of it so we could find the culvert and see what was blocking the inlet portion of the culvert.
Q. And were you successful in doing that? A. No.
Q. Do you remember when that occurred? A. It was in March of 1973.

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(Tr. p. 40)
Q. After the railroad line was taken out of service, how did that effect the position of the Kalo Brick and Tile Company in—how did it effect Kalo's competitive position in the brick market? A. Well, of course, our sales procedure was predicated on being able to deliver to our distributor by rail as previously stated in testimony and without rail service other means of transportation had to be arrived at and this left us basically two main means of transporting our product to the distributor; one, by motor freight, which would be trucking and the rates that have
(Tr. p. 41)
already been discussed on that, or loading trucks at our plant and trucking the material to the railroad in Fort Dodge and reloading said product in boxcars.

• • •

A. We notified our customers to this effect that we had no—we had no rail service and that we were going to have to try and serve them some other way and at that time the customers reported back to us that this is fine but on a long time pull they couldn't afford the increased cost of this service. And, therefore, we would be in a non-competitive type of situation in that market area.

Q. And what did this—how did it ultimately effect Kalo, the operation of the Kalo company? A. Well, it effected it to the point we couldn't be any more competitive so, you know, one does not stay in business and continue to lose money, so this was an actual demise of the company in the sense that we couldn't deliver our product on a competitive basis.

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(Tr. p. 51)

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Q. Did you in the ordinary course of your business receive a brochure of the Iowa Development Commission which carried an article by one Keith Peterson who is the manager of industrial development of the Chicago and Northwestern Transportation Company? A. Yes, I am sure we did.

Q. And did that brochure indicate that the railroads wished (Tr. p. 52) to eliminate their unprofitable lines? A. Yeah.

Q. I now hand you what the Court Reporter has marked Plaintiff's Exhibit 21 and ask you to state whether or not you received that brochure in the ordinary course of business? A. Yes. We receive these types of publications and this publication was in our file and we did receive it.

MR BLACKBURN: Plaintiff offers Exhibit 21.

MR. JOHNSON: No objection, Your Honor.

THE COURT: Exhibit 21 is admitted.

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(Tr. p. 53)

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(Tr. p. 145)

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MERLYN G. SPANGLER,

DIRECT EXAMINATION

BY MR. BLACKBURN:

Q. Would you state your name for the record, please?

(Tr. p. 146)

A. My name is Merlyn G. Spangler. I live at 1517 Grand Avenue in Ames, Iowa.

Q. Do you mind telling the Judge how old you are, sir? A. I am eighty-one.

Q. And what is your profession, sir? A. I am research professor of civil engineering at the Iowa State University.

Q. Now, what do you mean by the title research professor? A. Research professor is engaged in scientific research in the field of—in my case—the field of civil engineering, in addition to teaching duties in the same field.

Q. Are you still on the faculty, sir? A. Yes, sir, under special arrangements for retirement.

Q. I see. And do you have any other official titles in conection with your association with Iowa State University? A. No, sir.

Q. And would you describe your training, sir, at the undergraduate and graduate level? A. Well, I graduated from Iowa State in 1919. I went to work for the Iowa Highway Commission as a bridge designer. Five years later I went to work for the Iowa Engineering Experiment Station, which is a research arm of the College of Engineering at Iowa State. I worked fifteen years in full time in research as an assistant engineer. And then was designated half-

(Tr. p. 147)

time teaching as a research associate professor and then in 1947 was promoted to professor. My degrees are Bachelor of Science, Professional Degree of Civil Engineering, and the Masters of Science degree.

Q. Now, Professor Spangler, do you belong to any honorary societies? A. Yes, sir, I belong to Tau Beta Pi, an undergraduate honorary society, Sigma Chi, which is a research honorary organization, Phi Kappa Phi, and Chi Epsilon.

Q. Do you belong to any professional societies? A. Yes, sir. I am a member of—life member of the American Society of Civil Engineers and served as the president of the Iowa section in 1949. I am a

member of the American Society for Testing and Materials, American Society for Engineering Education, the Iowa Engineering Society, and the Highway Research Board, which is now called the Transportation Research Board of the National Research Council.

Q. Have you been awarded any special prizes as a result of your research and work in soil engineering? A. Yes, sir, I have had two awards from the Highway Research Board. One for paper of outstanding merit, another for general achievement in the field of highway research. I have had an award from the National Clay Pipe Institute, from the American Concrete Pipe Association and from the Iowa En-

(Tr. p. 148)

gineering Society.

Q. Professor, have you written any books? A. Yes, sir, I am author of the textbook *Soil Engineering,* which was first published in 1951, is now in its third edition, with a fourth edition under preparation.

Q. Is that used as a text for soil engineering in various universities throughout the United States? A. Yes, sir. The number of schools which have adopted the book fluctuates, of course, but in general, it is up in the range of thirty to thirty-five engineering schools, which have adopted the text.

Q. Now, are you a member of any special boards? A. I am not sure I understand what you mean.

Q. Well, do you belong to any special boards, advisory boards or anything of that nature or have you in the past? A. Well, I have served on committees of these various organizations which I have mentioned, which I would presume would fall in the category that you are referring to.

Q. Have you been a delegate to any national or international conferences on soil engineering on in the area of your expertise? A. Yes, sir. I was designated as the United States representative to a meeting of the OECD, that is, the Organization for Economic Cooperation and Development, which was

(Tr. p. 149)

held in Paris, France, in 1962. That, I think, besides committee assignments and preparation of papers for national organizations, meetings, annual meetings, I think, would be the answer.

Q. Professor Spangler, did you at our request or at the request of the Kalo Brick and Tile Company go to the scene of a track failure south and east of Fort Dodge, Iowa, at a switching area with Mr. Mitchell, Mr. Jerry Kiliper and Mr. Jerry Schnurr and myself? A. Yes, sir, I visited that site on July 23rd, 1975.

Q. And, can you give the Court a general description of the terrain in that area? A. Well, the terrain is quite rugged. Steep slopes. And although not—not very high hills, it is what I would describe as a rugged terrain.

Q. And I want to hand you some photographs that have been introduced into evidence and identified here as Plaintiff's Exhibit 20 and 16 and ask you to state whether or not that is a description of the track and the right-of-way as you observed it? A. Yes, sir, that coincides with my observations at the time of my visit.

Q. And I will hand you two other photographs which have been offered and received into evidence and identified as Exhibit numbers 18 and 19, which are aerial views of the same area, and ask you to state

(Tr. p. 105)

whether or not that is a fair and accurate representation of the terrain and the water as you observed it? A. Yes, it is. Both of them are.

Q. Now, Professor Spangler, did you observe the condition of the track and the roadbed at that position, make a visual observation of it? A. Yes, sir.

Q. And did you observe the general terrain in the area both on the west side of the track and on the east side of the track? A. Yes, sir.

Q. And based upon your observation—well, before I get to that question, perhaps you should describe to the Court what you observed there with respect to

the—to the condition of the track and with respect to the condition of the roadbed? A. Well, the track in the vicinity of the switch where the spur line connects with what I understood was the main line of the Fort Dodge, Des Moines and Southern was out of place and both the—horizontally and vertically, and showed evidence of the results of a failure of the railroad embankment in that area. I noticed also—first, I would say along the east side of the railroad track was a small stream, which I was told was called Gypsum Creek and the slope down to the creek was

(Tr. p. 151)

quite steep. On the other side of the track on the west side there was considerable ponded water ponded by the railroad embankment and it was obvious that ponds of water had been there for a considerable period of time because of green scum formation on the surface of the pond.

Q. Doctor, based upon your observation of the terrain and based upon your observation of the displacement of the track and the roadbed and based upon your education, experience in the field of soil engineering, and soil dynamics, do you have an opinion as to what caused the roadbed to become displaced? A. Yes, I have an opinion.

Q. And what is that opinion, sir? A. It is my opinion that the ponded water on the west side of the railroad embankment caused several phenomenon which permitted or caused the slide which had occurred. It was obvious that there was not adequate drainage beneath the railroad embankment to carry the ponded water away or accumulation of water and it is my opinion that that ponded water contributed to the slides in several different ways, one of them being a weakening of the soil due to the saturation of the embankment; another being due to hydrostatic pressure created on the upstream side of the embankment; and the third force induced in the embankment by

(Tr. p. 152)

seepage, water passing through the embankment. In addition to those forces, it appeared to me that the railroad embankment had been constructed on a slope —a rather steep slope down towards the Gypsum Creek and the normal action of gravity would tend to have an affect of pulling that embankment downward. Now, all of those forces combined plus the weakening affect of the soil due to the saturation characteristic, in my opinion, would readily be the cause of such a failure.

Q. Professor Spangler, would that be based on accepted scientific principles that are accepted generally in the area of soil engineering? A. In my opinion, yes.

Q. And what would those scientific principles be? A. Well, the one that I mentioned of a component of force tending to pull that embankment down the slope would be one. Another would be that hydrostatic force of the water accumulation or the ponded water on the upstream side. A third would be the seepage forces, which would be caused by water seeping through the embankment. And, then, in addition, the weakening of the soil both in cohesion and friction, which are the characteristics of the soil, which would tend to resist these actuating forces that I have described.

(Tr. p. 153)

Q. Doctor, did you prepare a sketch of what you observed and what you concluded? A. Yes, sir, I wrote a report.

• • •

MR. BLACKBURN: Q. I hand you what the Reporter has marked Plaintiff's Exhibit 26 and ask you to state whether or not that is a copy of the sketch or diagram that you prepared?

THE WITNESS: A. Yes, sir, it is.

Q. I understand that that is not attempted to be drawn to scale or what is your testimony with regard to this sketch? A. Well, the sketch is intended to be illustrative only of these forces which I have—the actuating forces which I have described. It is not

to scale. It is not intended to be accurate in that respect.

• • •

MR. BLACKBURN: Plaintiff offers Exhibit 26.

THE COURT: No objection by the Defendants, Exhibit 26 is admitted.

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(Tr. p. 154)

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Spangler, did you consult any treatises in the—in reaching your conclusion concerning the cause of the collapse or failure of the roadbed? A. Did I consult with whom?

Q. Any treatises or scholarly works? A. Only my own textbook, perhaps, would be the answer to that.

Q. Okay. Did you consult any published reports on the geological structure of that area of Webster County? A. No, sir.

Q. Mr. Spangler, if the roadbed was repaired and there was adequate drainage at this spot which you inspected, would not the force of gravity continue to pull the roadbed down the slope in the future? A. Yes, sir. It would continue to contribute to the force tending to cause it to slide.

Q. Did you observe any slides of clay or mud in the area above the level of the roadbed or which originated above the level of the roadbed? A. None that I could identify as such a slide.

Q. If there was such a slide which originated above the level of the roadbed and to the west of the roadbed and above the level of the ponded water that you have included in the assumptions of fact that your opinion is based on, if there was such a slide on the west

(Tr. p. 155)

and above the level of the roadbed, the ponded water would not contribute to affecting that slide, is that correct? A. I agree with that opinion.

Q. So, then, is it your opinion, sir, based on your expertise, that the instability of slopes to the west and above the roadbed would not be affected by the existence of ponded water at or below the roadbed level? A. Only to the extent that that water which was ponded came from the area that you are describing.

• • •

REDIRECT EXAMINATION

BY MR. BLACKBURN:

Q. Well, Professor Spangler, assume the facts in this case were to show that that section of track had been used by the shipping public for a period of dating back to 1890 and assume that the track prior to the time in question of April of 1973 had never been taken out of service because of landslides and assume the fact to be that the track had carried cargo such as grain and passengers over that same section of road for a long period of years, would you then have an opinion as to what would cause that slippage?

(Tr. p. 156)

A. Well, my opinion would be the same as I have expressed that the ponded water on the upstream side would be the cause. Now, I have no knowledge of how long that ponded water existed, but, of course, such a pond would not exert a force which would be immediately effective. It would be a developing situation over a period of time.

• • •

RECROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Spangler, does your work concerning highways be primarily the work with culverts in determining loads on culverts and so forth? What is the proper way to put in a culvert for a certain situation? A. That's been an important part of my research, yes, sir.

Q. Have you ever had extensive experience with an area that is subject to clay or mud slides? A. Not specifically, no, sir.

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(Tr. p. 158)

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MR. BLACKBURN: Interrogatory No. 4. State the name or names and company title or titles of the person or persons who did in fact order a cessation of train service to the Plaintiff's plant in the spring of 1973? Answer: Defendant Northwestern knows of no such order having been given. The line was impassable. Interrogatory No. 6. I'm sorry. Interrogatory No. 5. Please describe in detail the embankment slide as alleged in paragraph 11 of your answer as it appeared on April of 1973? Answer: Plaintiff's plant is located at the end of a former M and St. L. Railways extending from Fort Dodge to Kalo, generally paralleling the Des Moines River. In the spring of 1973 service to it was accomplished by using the former Fort Dodge, Des Moines and Southern track extending generally from Fort Dodge south to Robert. (Tr. p. 159)
The two lines crossed at a point known as Shady Oak just north of the river. A track connection between the two lines left the Fort Dodge line at approximately mile post 3.7. The Fort Dodge line in the vicinity of the connection runs on a north-south direction and is on a side slope with the embankment sloping steeply upward on the west side of the track and steeply downward on the east side of the track. Two different slide areas affected this track. One slide engulfed a section of track approximately 150 feet long including the turn out for the connection to the M and St. L. track to the Kalo Brick and Tile Company. The other slide on the connecting track itself engulfed a section of track approximately 60 feet long. The embankment in the slide area failed and slid down the slide and turn out and shifted two to three feet in the alignment. Interrogatory No. 11. Please state whether or not soil compaction or other subterranean tests were made of the right-of-way in question following the alleged "embankment slide" of 1973? Answer: Such tests were not made by the Defendant Northwestern but Defendant believes that soil tests were made for the Iowa State Highway Commission in late 1972 and early 1973 for a

proposed highway which could—which would have crossed the former Fort Dodge track north of the slide area. (Tr. p. 160)

Interrogatory No. 14. State the date of the last clean out of the culvert under the railroad right-of-way from the Vincent Clay Products Company and who cleaned it? Answer: Unknown. Interrogatory No. 15. State the name of the employee in charge of maintaining and repairing culverts and waterways under the railroad involved—pardon me—under the railroad in the area involved and the time involved? Answer: These duties were performed as needed by either the track forces or bridge and building forces. These interrogatories are signed under oath by one Lewis T. Duerinck, who states he is the general solicitor of the Defendant, under oath on the 5th day of August, 1975.

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(Tr. p. 163)

JACK CHMELER,

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DIRECT EXAMINATION

BY MR. BLACKBURN:

Q. Would you state your name, sir? A. Jack Chmeler.

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Q. And what is your occupation, sir? A. I am station administrator for the Chicago and Northwestern Transportation Company at St. Paul, Minnesota.

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Q. Were you formerly stationed in Fort Dodge, Iowa—

A. (Interjecting) Yes, sir.

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Q. And what period of time were you stationed in Fort

(Tr. p. 164)

Dodge as freight agent? A. Let's see. I came here July 17, 1972, and left here December 15, '74.

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(Tr. p. 165)

Q. Were you present in the Courtroom yesterday when Mr. Jerry Schnurr testified as to certain conversa-

tions with you in the latter part of 1972? A. Yes, sir.

Q. Do you recall that conversation? A. I recall some of the conversations that he read out of his diary, yes, sir.

Q. And do you remember the substance of that conversation that the Chicago and Northwestern Transportation Company had agreed to provide service to the Kalo Brick and Tile Company? A. As I recall, he had several—he mentioned several instances of that type of conversation. I wasn't present at all of them. I do remember a time or two when Jerry and I discussed service problems.

Q. You did discuss service problems? A. Yes, sir.

Q. And that was prior to the slide of April, 1973, is that correct?

(Tr. p. 166)

A. Yes.

Q. And you don't dispute, I guess, the time that these conversations occurred according to his diaries? A. No.

Q. And you would have no reason to dispute the time? A. No, I really wouldn't.

Q. Was Ron Gibbons a subordinate of yours? A. Ron Gibbons was my immediate supervisor.

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Q. Now, Mr. Jerry Kiliper testified yesterday that he made a note in his diary on April 13, 1972, as follows: Jack Chmeler promised in person today to get a definite schedule worked out on our service. Do you remember that conversation? A. I don't remember the exact date, but I do remember Jerry and I discussing such a thing.

Q. He also made the comment Ron Gibbons going to hire more help. Do you remember that?

(Tr. p. 167)

A. I remember during that period. I am not sure. There were several changes in hours of service and so forth along about that time whereby our crews were only permitted to work fourteen or twelve

hours as compared to originally being able to work sixteen hours on account of the unavailability of the people at the time and our inability to train them fast enough to take up the time. There were times when we were short of people. We were trying to hire people and qualify them to perform our service.

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(Tr. p. 187)

HERBERT O. IRELAND

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DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Sir, please, sir, please state your name and your present occupation? A. Herbert O. Ireland, Professor of Civil Engineering, at the University of Illinois, Urbana-Champaign.

Q. Dr. Ireland, would you please give me a brief description of the education that you have had in the area of soil engineering? A. I have a PHD degree wherein I majored in the field of soil mechanics and foundation engineering.

Q. What is—would you describe to me what soil mechanics and foundation engineering is? A. It is the study of the geological materials of the earth's

(Tr. p. 188)

crust with relation to their uses, engineering materials in contrast to their uses for agricultural purposes.

Q. And after you obtained your doctorate degree, have you had experience in the area of soil mechanics and soil engineering? A. Yes. I have consulted on a number of projects of varying kinds in this field.

Q. Over what period of years would this be? A. Since approximately 1948.

Q. Have you had experience and/or training in studying the movement of slopes and the instability of slopes? A. Yes, sir.

Q. What, can you give me a brief description of the extent of that experience and training? A. Well, most of the things—I teach a course dealing with this—

in part with this topic of slope stability. I have consulted with a number of railroads on some of their problems involving slope stability problems.

Q. Now, Dr. Ireland, this case is, as I am sure you are aware, involves the Kalo line of the Northwestern Railroad just south of Fort Dodge, Iowa. Have you at any time had an opportunity to—

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(Tr. p. 189)

Defendant's Exhibit W. Have you had an opportunity to inspect on foot the portion of the Kalo line running from say the Illinois Central line down to the junction of the Des Moines and the junction of the Des Moines, Chicago and Northwestern line and the Fort Dodge—Is that the proper name?

MR. BLACKBURN: Fort Dodge, Des Moines and Southern Line.

MR. JOHNSON: (Continuing)—Fort Dodge, Des Moines and Southern Line.

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(Tr. p. 201)

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MR. JOHNSON: Q. • • • Would you answer the question, Mr. Ireland, when did you make that inspection tour of that section of the line?

THE WITNESS: A. Oh, I think I answered the question, reaffirm on April 7, 1976.

Q. Who was on that tour with you, if you recall? A. Mr. Dick, Mr. Maury Reid of the Chicago and Northwestern Railroad and another Chicago and Northwestern man. I think a Mr. Christensen.

Q. R. J. Christensen? A. I believe so.

Q. Did you walk that entire section of the line? A. We traversed the entire section. We walked part of it. Some of it we traversed in a high rail vehicle.

Q. Do you have some photographs that were taken of that section of the line on or about the time of your inspection tour? A. Some photographs taken within a few days afterwards at my request, yes, sir.

Q. Okay. Mr. Ireland, would you please describe to us what you observed during your inspection tour of that line?

(Tr. p. 202)

A. The question posed to me was what was responsible for some of the problems and my first impression as we entered the line was that the slopes above the track were basically unstable. In some areas these slopes are somewhat removed from the track so they are having no influence on the track. In other areas the slopes are close to the track. In fact, the track was built on a side hill between what is now called Gypsum Creek and the adjacent higher land and much of this is in movement. There were places where there was water ponded on the uphill side of the track and there were, I believe, at least two locations where the subgrade under the track had been washed out at some time.

Q. Did you notice or observe instability of the slope along the entire or most of the section of the line from the Illinois Central Railroad down to the Chicago and Northwestern line? A. Where the slopes were reasonably close to the track, yes, this entire area seems to be more or less unstable. There were some areas where current mining activity has pushed fresh debris over the crest of the slope and in those areas you cannot judge.

Q. Now, Dr. Ireland, this is Defendant's Exhibit PPP. This does not appear to be a photograph. This appears to be some sort of a reproduction of a serial

(Tr. p. 203)

photograph, but does that accurately portray the perspective, not necessarily the detail of the configurations, but the perspective of this slope that you are talking about as it relates to the roadbed? A. This is a panoramic view that has been assembled from a number of individual photographs that shows the area from the vicinity of the Shady Oak switch to the south and the slope that is on the west side of the railroad. And it does show the slope proximity to

the railroad and I have seen glossy prints of some of these sections wherein one can identify the various portions of the slope that is in movement.

Q. Do you know who has the original of this serial photograph? A. That's a panoramic view. I understand the original prints are in the Chicago and Northwestern offices in Chicago.

Q. Are they with Maurice Reid? A. I understand they were in his office.

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(Tr. p. 204)

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THE COURT: Triple P is offered?

MR. JOHNSON: Yes.

THE COURT: No objection by the Plaintiff, PPP is admitted.

MR. JOHNSON: Q. Using this Exhibit PPP, can you point out to the Court, Mr. Ireland, the area that you are talking about that you feel represents an unstable slope?

A. This area from about in here and at about this time.

Q. Are we looking west? A. We are looking west, yes. The switch is in this general location to the right of this photograph and the two tracks begin to separate at that location as they approach the vicinity of the Des Moines River to the south. We are looking west and this slope from the vicinity of this switch to the limits of the photographic representation of the higher level of the track, that is all a slope that shows evidence of slump and slumps and instability.

Q. How long do you think that slope has been moving?

(Tr. p. 205)

What would be your estimation? A. Many, many years.

Q. Would you—how long would you expect it to continue moving? A. Equally long.

Q. Thank you. Do you have photographs, Dr. Ireland, that you feel depict the effect of this slope movement has had upon the Kalo line in this area? When I

speak of this area, I mean from the Illinois Central line down through the CNW line on the Fort Dodge, M. and St. L line? A. This photograph shows one location where the materials that are sliding downhill. This is Exhibit—Defendant's Exhibit S-7.

Q. Yes. A. These materials have crossed the ditch at the top of the balled section have encroached over the end of the ties and at the west rail or the track that is there currently as of last April. The berm at the rail is on the order of three to four feet thick where these materials have slid out over the track. There is one place where there is unquestioned indication that the slopes are unstable at this location. They are obviously moving with respect to the railroad alignment. In Defendant's Exhibit S-5, a photograph of some of the track again taken last April, there is evidence that the track is considerably

(Tr. p. 206)

out of proper alignment and it would appear that one rail is higher than the other, which is presumed to be a consequence of the slope movements.

Q. That's S-5. A. On Defendant's Exhibit S-16, the track is visible. Again, this photograph is looking toward the west and a few feet above the track is a light colored zone that represents a berm on that intermediate slope which undoubtedly is a consequence of slope movement at that location. This is going across here. And on Defendant's Exhibit S-12, there is visible a ponded area just beyond the track and above that ponded area a considerable number of slump blocks, again, evidence of slope instability.

Q. What is slump block? A. That's a block of material that has moved down a slope and has not completely broken up but leads to an irregular surface. The same type of thing is also indicated on Exhibit—Defendant's Exhibit S-20. I think those are reasonable examples.

Q. Now, do some of these pictures show the non-alignment of track? A. That's some subsequent activity that has nothing to do with this problem.

Q. Okay. A. This Exhibit S-1 shows the switch and it appears that this is a location where there has
(Tr. p. 207)
been a wash out. I am not in a position to say whether that was a culvert location or not. It may have been, but it's certainly wash out of the track on that location that has some responsibility for some of the misalignment that is visible there.

Q. Okay. What about the other misalignments? A. Well, there is some in the upper part of the photograph before the switch. This would be north of the switch that would appear to be perhaps of consequence of overall slope movement.

THE COURT: Counsel, which Exhibit is he referring to?

MR. JOHNSON: S-1.

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MR. JOHNSON: Q. What about Exhibit S-6, Mr. Ireland?

THE WITNESS: A. This exhibit indicates that the east rail is materially lower in elevation that the west rail. This could be a consequence of movement of the uphill slope on the west side tending to raise that westerly rail or it might also be a consequence of some embankment instability causing the east rail to settle with respect to the west rail.

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(Tr. p. 208)

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THE COURT: Exhibits S-5, S-6, S-7, S-12, S-16 and S-20 are admitted.

MR. JOHNSON: Q. Dr. Ireland, on the basis of your expertise, on the basis of your inspection tour of this section of the railroad we have been talking about and that is depicted in part at least on the various exhibits that we have discussed so far, do you have an opinion on what has caused the misalignment, nonalignment of the tracks and the shifting in in the roadbed in this section of the line?

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(Tr. p. 209)

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THE WITNESS: A. Yes, sir.

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MR. JOHNSON: Q. What is that opinion, Mr. Ireland?

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(Tr. p. 211)

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THE WITNESS: A. The shifting of the track is in my opinion due to several cause. For the most part I think this area was most likely unstable before the railroad was built in this location. And it has continued to be unstable in the intervening years. Undoubtedly some problems with the track have been a consequence of poor drainage at the track level, but compared to the total

(Tr. p. 212)

length of the trackage involved in the instability of this represents a small portion of their total problem.

MR. JOHNSON: What is the remainder of the problem, Dr. Ireland?

THE WITNESS: A. Well, the fact that the slopes are unstable and I have every reason to believe were unstable before the railroad was even built there.

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MR. JOHNSON: Q. Dr. Ireland, would you explain to me what exactly is the scientific theoretical explanation that explains why the slopes are unstable, why they are

(Tr. p. 213)

moving into this direction, which is down?

THE WITNESS: A. This movement of a slope downhill is a consequence of the forces of gravity acting on a mass of material when on some potential movement surface there is inadequate strength to resist that movement.

Q. Is there—Is it fair to depict it as having an axis or pivot and that is a sort of a center of a circle and the slope is part of the circle and is tending to move down around the circle? A. For purposes of analysis, we frequently assume that the mass is moving on a cylindrical surface, about some center of that cylinder.

Q. Now, have you had experience in the past with railroad roadbeds that have had misalignment problems and shifting of the roadbeds due to slope movement?

A. Yes, sir.

Q. And have you made recommendations to railroads in the past on what they would need to do or what they should consider doing with regard to rehabilitating that slope to prevent slope movement? A. I have done that.

Q. On a number of occasions? A. Yes, sir.

Q. Now, on this occasion with respect to the Kalo line,

(Tr. p. 214)

Dr. Ireland, can you tell me what you think would be required in order to remove the problem of instability of this slope along that section of the Kalo line?

MR. BLACKBURN: Just a moment, Dr. Ireland. May I have a moment.

MR. JOHNSON: I am not asking him to testify as to the expense involved just to physically what he believes would be necessary to rehabilitate that slope. He is not going to testify to the cost involved.

MR. BLACKBURN: I think Mr. Johnson, in his opening statement, Your Honor, made a statement that it would cost $150,000.00 to rehabilitate this line. We asked in an interrogatory with regard to whatever studies have been made with regard to the costs and so forth and with regard to the repairs and that interrogatory was not answered and it was answered that no examinations or studies had been made.

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(Tr. p. 216)

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MR. JOHNSON: Q. Mr. Ireland, have you made any soil compaction or subterranean tests on the right of way in question following the embankment slide of

(Tr. p. 217)

1973?

THE WITNESS: A. No sir.

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MR. JOHNSON: Q. Now, Mr. Ireland, would you please explain to me what course of action you would recommend if you were going to advise the railroad on what

they would have to do to remove this slope instability problem permanently?

THE WITNESS: A. In the first place—

MR. BLACKBURN: Let my objection stand to the answer.

* * *

THE WITNESS: A. In the first place, without considerable study, I am not certain it would be possible to make this area permanently stable. Normally in these type of slope stability problems, there are three choices of treatment to stabilize this mass of material that is rotating about some center. One is to put a counter balancing load at the bottom end of the part that is moving. If this happens to be the location of a stream or of a railroad, this obviously cannot be done. In some types of soils, (Tr. p. 218)

it is possible to increase the resistance to the movement by altering their strength characteristics. The information I have found in the geological literature and in this study made by the Highway Department suggests that these soils would not lend themselves to a change, an increased strength due to subterranean drainage, for instance. So the third alternative for trying to stabilize such a sliding mass is to remove some of the material from the upper part that is tending to cause the gravity rotation of movement. And that appears to me to be about the only possibility if one were to undertake a program of trying to stabilize the slides in this particular area.

Q. What would that entail in this particular case? A. Well, this I have not studied from the viewpoint of making such a recommendation, but it undoubtedly would require the excavation of a lot of material from the upper part of these slopes and perhaps a reshaping of the slopes.

Q. Would you characterize this as a major construction project? A. Considering that the instability is throughout the length of the alignment where it is close to the slopes, this would undoubtedly be a major project.

Q. If you were advising the railroad on rehabilitation
(Tr. p. 219)
of this line, would you advise them to give serious consideration to construction of a new line rather than attempting to rehabilitate this one? A. In my professional capacity, I could advise them on what I think might be required to attempt stabilization of existing slopes and perhaps suggest to them after they had priced this construction that an alternative might be to consider a new alignment. I would not recommend such an alignment.

Q. Pardon? A. I would not recommend the new alignment.

Q. Yeah. You would not have the—It would not be within your professional capacity to make that decision, is that correct? A. That's correct.

Q. But is it within your professional capacity to ask the railroad to consider that possibility if you think that it might be? A. I think—

Q. Might prove to be necessary? A. Excuse me, sir?

Q. Go ahead. A. I think any time a professional engineer makes a recommendation to a client, the client is under some obligation to evaluate that recommen-
(Tr. p. 220)
dation from the standpoint of his own purposes.

Q. Dr. Ireland, are the surveys that you have referred to, are they matters of public records?

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(Tr. p. 226)

CROSS-EXAMINATION

BY MR. BLACKBURN:

* * *

Q. Well, I guess basically what we are getting at, if you are coming here to testify that this land has always had a tendency to shift and it had a tendency to shift since prior to the time that the road was built, is that a fair statement? A. Yes, sir.

Q. Then is it not an act of God, is it, to cause this road to shift?

MR. JOHNSON: Objection, Your Honor that's asking for a conclusion of law by this witness which he is not qualified to give.

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MR. BLACKBURN: Q. Well, this isn't a sudden happening is it?

THE WITNESS: A. No, sir.

Q. It is something that would be expected over the years? A. It has been occurring over the years.

Q. Right. And something that could be guarded against by proper maintenance? A. I don't think so.

Q. Well, are you saying—I think you said that when you were out there that the water was impounded on the

(Tr. p. 232)

west side of the track? A. In places.

Q. And you said that had some effect on it? A. Undoubtedly.

Q. Right. Now, I think it might be important to discuss the difference between slope movement and track movement and there could be a difference, could there not? A. Yes, sir.

Q. And although there is slope movement over the years, the track movement could be of fairly recent duration, could it not? A. You could have an interrelationship, yes, sir.

Q. Now, my question is, although there is slope movement over the years, the track movement could be of fairly recent duration depending on a lot of other facts including track maintenance, couldn't it? A. Yes.

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(Tr. p. 255)

R. J. CHRISTENSEN

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DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Would you state your name and occupation, sir? A. R. J. Christensen. I am assistant division manager of engineering on the central division of the

Chicago and Northwestern Transportation Company.

* * *

Q. Have you had experience during your employment with the Northwestern with sliding slopes and the effect that that type of condition may have on railroad roadbeds? A. Yes, I have.

Q. Would you describe briefly, Mr. Christensen, the extent and nature of that experience that you have had? A. Well, we have always had in the twenty-eight years I have been around, we have had slides in various locations, some small, some big. I have

(Tr. p. 257)

had experience right here in Fort Dodge on the original line, the M and St. L line, that served the Kalo Brick and Tile. We had—in 1961 was the first time that this particular portion was part of my territory. We had a slide that took us out of service in four or five spots along the line and we then repaired those areas in '61.

Q. Mr. Christensen, when you refer to the old M and St. L line, on this Defendant's Exhibit W, are you referring to the line denoted the Chicago and Northwestern? A. Yes, I am.

Q. Thank you. A. Shown in red. At a later date in I believe it was 1966, in the spring of the year, we had a slide which took us out of service for I suppose six to seven months.

Q. What line are you referring now? A. This is still on the line, on the old M and St. L.

Q. Mr. Christensen, have you had experience on lines other than the old M and St. L and Des Moines, Fort Dodge and Southern? A. Yes, we have. I worked on a slide up in Wisconsin where we had to renew the embankment.

Q. Okay. You have had—you are familiar with the history of the Fort Dodge, Des Moines and Southern line near Fort Dodge and the old M and St. L line,

(Tr. p. 258)

is that correct? A. Yes.

Q. Have those lines had a long history of slope movement, clay slides? A. Yes, they have.

Q. * * * Is the type of terrain, soil conditions that is present in the Old M and St. L line substantially similar to the soil conditions and terrain that is present on the Fort Dodge, Des Moines and Southern line? A. Yes, it is.

Q. Would you explain to me the experience you had in the late '60's with a slope slide problem on the old M and St. L line, please? A. Well, in the spring of 1966 we had a slide and we did a lot of checking around. First of all we thought that we might take some soil test borings. But when I met the man from their consulting firm that do test work out of Ames—I can't tell you their name right now—we went over the line and he said that the cost could go as high as a hundred thousand dollars just to take the test borings on this line because of the location and the conditions in order to get proper tests to show what we wanted.

Q. And what do the test boring provide you with? (Tr. p. 259)

Does that tell you how to repair the problem? A. No, but the test borings would show us what kind of soil conditions we have, how deep we would have to go possibly to remove them or what water conditions we have in that area.

Q. Did you decide to have test borings made at that time? A. No, we did not.

Q. What did you do? A. We hired a contractor and we went in and we dug this area completely out. We dug down and keyed into the rock. Now, this was only the embankment of the railroad that we dug out and we brought in new fill and built the road up and put it in service, I believe, in the end of September of '66. The line held until March of 1967 and as soon as the frost went out of the ground in March, we lost the whole area again. It slid down the—the whole embankment slid into the river.

Q. After rehabilitation of the M and St. L line proved to be unsuccessful, did the railroad then begin using the old Fort Dodge, Des Moines and Southern line? A. Yes. It was very shortly after that that we started serving the remaining line down there with the Fort Dodge, Des Moines and Southern and the connection which we called Shady Oak which connected the Fort Dodge, Des Moines and Southern with the old M and St. L trackage.

(Tr. p. 260)

Q. And did the Fort Dodge, Des Moines and Southern line also have a history of sliding slopes? A. Yes, it did.

Q. Have you had a chance to review Exhibits S-6, S-7, S-16, S-5, S-12, S-1, S-20, which are photographs depicting portions of the Fort Dodge, Des Moines and Southern line, Mr. Christensen? A. Yes, I have.

Q. Were those pictures taken at your direction? A. Yes they were.

Q. Do those pictures depict a sliding slope movement that has adversely effected the railroad roadbed? A. Yes, they do. They show the embankment sliding down onto the railroad and also the embanking embankment sliding out from under the trackage.

Q. Now, does one of those pictures show what—well, when you—did you go on an inspection tour of this line? A. Yes, I did.

Q. When was that? A. Well, I have been on several of them.

Q. Did you go on one just prior to the taking of these pictures? A. Yes, I did, the day before.

Q. When was that? A. I don't have the exact date.

(Tr. p. 261)

Q. Was it in the spring of '76? A. Spring of this year, yes.

Q. Was a Dr. H. O. Ireland with you on that day? A. Yes.

Q. Did you notice—did you observe what appeared to be a washout at the northern junction of Shady Oak Transfer? A. Yes, I did.

Q. Do you see any picture in there, any photographs among those exhibits that may depict the area of that washout? A. Yes, Exhibit S-1.

Q. To what extent, Mr. Christensen, in your opinion on the basis of your experience in engineering, railroad engineering, did that washout effect the inability to move cars over this line? A. Well, the washout itself basically had no bearing on the removal of the line from service. The washout would have been very easy to repair had it not been for the other problems.

Q. You fixed washouts before? A. Many of them.

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(Tr. p. 262)

Q. Mr. Christensen, if you were going to try to institute a permanent rehabilitation of the Fort Dodge, Des Moines and Southern line and remove this problem of slopes sliding down and adversely effecting the roadbed, could you or do you have an idea of what

(Tr. p. 263)

steps you might take to accomplish that attempted rehabilitation?

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THE WITNESS: A. Yes.

MR. JOHNSON: Q. Would you please describe to me what steps you might recommend—

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MR. JOHNSON: (Continuing) —if the decision has been made to go ahead and attempt to accomplish that rehabilitation?

MR. BLACKBURN: Plaintiff objects to that for the reason it is irrelevant to any issue respecting the railroad's liability in this case to furnish car service. It is irrelevant to what steps were to be made. The fact of what steps were to be made is irrelevant.

THE COURT: Overruled. You may answer.

THE WITNESS: A. In order to make a permanent repair to the track, I feel that we would have to go in

(Tr. p. 264)

and remove the high embankment adjacent to our track, first of all, and move them back a considerable distance from our track. We would then have to go in.

Q. Mr. Christensen, are these embankments located on the railroad right-of-way? A. Most of them are not.

Q. Would that involve acquisition of the property? A. Yes, it would, or either purchase or sloping rights to work on this property. It would also require some kind of purchase or agreement to be able to dispose of the dirt which was removed. We would then have—.

Q. Do you mean you would have to purchase land for the depositing of the removed dirt? A. Yes. We would then have to go into certain areas of our track subgrade.

Q. Would you have to have test borings? A. We should, yes, definitely, to tell us what areas we should go into and remove and to what extent and we would have to dig out the soils which are not stable and replace them with a good stable foundation.

Q. Such as you did on the M and St. L line? A. On the subgrade itself, yes.

Q. Have you had occasion to have railroad people perform a contract with outside contractors for the removal of the earth?

(Tr. p. 265)

A. Yes, I have.

Q. Have you had occasion to do that frequently in your experience or quite often? A. Quite often, yes.

Q. And have you had to dig down and attempt to rebuild roadbeds from rock or the first solid subterranean surface? A. Yes, we have.

Q. Mr. Christensen, on the basis of your experience in railroad engineering, and your knowledge of the particular problem with slope slides on the Fort Dodge, Des Moines and Southern line, do you have an opinion on what would be your most conservative minimum estimate of the cost to the railroad of the earth re-

moval, and rebuilding of the roadbed from the solid subterranean surface up on the Fort Dodge, Des Moines and Southern Railroad so that such work would be sufficient to permanently rehabilitate the line, if you feel that is possible?

MR. BLACKBURN: Yes or no answer.

THE WITNESS: A. Yes.

* * *

(Tr. p. 266)

MR. JOHNSON: Q. What is your opinion?

* * *

(Tr. p. 267)

THE WITNESS: A. Well, in my opinion, it would be in excess of a quarter of a million dollars to put this portion of the line back into operation that would be

(Tr. p. 268)

reliable.

* * *

MR. JOHNSON: Mr. Christensen, on the basis of your particular knowledge of this section of railroad line, that is, Fort Dodge, Des Moines and Southern, and your prior experience with attempting these types of slope rehabilitation and roadbed rehabilitation operations, do you have an opinion on the length of time that would be involved in attempting to shore up these type of construc-

(Tr. p. 269)

tion projects on the Fort Dodge, Des Moines and Southern line?

THE WITNESS: A. Yes.

MR. JOHNSON: Q. What is that opinion?

MR. BLACKBURN: Well, same objection as last urged. It is irrelevant to the pleaded issues.

THE COURT: Overruled. You may answer.

THE WITNESS: A. Due to the fact that we would have to obtain land and other items in there plus the dirt work and so forth, it would be a minimum of two years.

* * *

CROSS EXAMINATION

BY MR. BLACKBURN:

* * *

(Tr. p. 277)

Q. Do you know whether or not that water was impounded there prior to April 4th, 1973? A. It has been impounded at different times, but released to go through.

Q. I see. It was released to go through at different times. And that was with your knowledge and as division engineer? A. That's right.

Q. And when was it released in prior years? A. I wouldn't know the dates.

Q. Well, would it have been prior to April 4th, 1973? A. Yes, It had been cleaned out in the past.

Q. I see. When was the decision made not to clean it out? A. I don't really think I can say. I don't know.

Q. Well, at least sometime prior to 1973 you knew that water was being impounded on the west side of the track and somewhere a decision was made not to clean it out, is that what you are saying? A. No, prior to 1973 it was always cleaned out and drained out. To my knowledge whenever it built up, it was drained.

(Tr. p. 278)

Q. Tell the Court why it wasn't drained out in 1973? A. Because it was a minor part of the problem, the draining out would not have helped. It was the slides that were causing the line to go out of service.

Q. It seemed to be of sufficient problem the railroad took care of it prior to that time, did it not? A. We normally take care of our drainage on our roadbed.

* * *

Q. The fact is when this line was taken out of service in April of 1973 absolutely nothing was done by the Chicago and Northwestern Transportation Company? A. I can't answer that. I was not there. I do not know.

Q. But you have the records? A. Yes, I do.
Q. And have you looked at those records? A. No, sir.
Q. Pardon? A. No, sir.
Q. You haven't looked at those records? A. I have not checked in to see what was done.
Q. Now, you stated that—gave an opinion here that it would cost a number of dollars to put the line back in service and part of that was due to land acquisition. Did you go out and talk to any of the landowners there about the land acquisition? A. No, I did not.
Q. Did anybody from the Chicago and Northwestern Transportation Company? A. No, not to my knowledge.
Q. Did you retain any contractors to go out there and make any kind of studies at all?

(Tr. p. 285)

A. No, sir, again, not to my knowledge.
Q. Well, you would be the man to know if they were done, wouldn't you? A. Well, they could have been done in '73 and part of '74 before I did it, but to my knowledge, no.
Q. So far as you know then nobody from the Chicago and Northwestern Transportation Company made any attempt to find out what the land prices there were for acquisition? A. Not to my knowledge.
Q. But that's part of the basis upon which you make your estimate as to what it would cost to repair this? A. That's a portion of it, yes.

* * *

(Tr. p. 295)

REDIRECT EXAMINATION

BY MR. JOHNSON:

Q. Mr. Christensen, as a railroad engineer, do you have extensive experience in observing a set of rails and knowing by visual inspection whether those rails are safe for the operation of locomotive and cars? A. Yes, I have made many inspections.

Q. Are there circumstances or instances in which the eye of a trained railroad engineer looking at a set of tracks will pick out unsafe areas that the eye of a layman without extensive experience in that line of work might not notice? A. Certainly.

Q. And when you talk about slide problems on the Kalo —on the Fort Dodge, Des Moines and Southern line, are you talking about problems that have influenced the alignment of tracks or stability of roadbed to the extent that it might not be safe to pass a locomotive and cars over that rail? A. That is correct.

Q. And are there spots when you inspected the line—were there spots on the line which you noticed with your experience and trained observation that a layman might not realize present a safety hazard? A. Yes, there were.

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JERRY KILIPER,

DIRECT EXAMINATION.

(Tr. p. 301, l. 22 *through* p. 302, l. 2)

• • •

Q. By April 18th the company had decided to go out of business, is that correct? A. That's what the letter says there.

Q. I am asking whether you recall this letter refreshes your recollection?

(Tr. p. 302)

A. If the letter—I wrote the letter and that's what the letter says. I would assume that's a correct statement.

• • •

JERRY SCHNURR,

DIRECT EXAMINATION.

(Tr. p. 318, ll. 11-16)

• • •

Q. At that time where were you after the landslide? You were no longer receiving cars at the—on the Kalo branch, were you? A. No, sir.

Q. You were receiving them from Fort Dodge? A. Yes, sir.

• • •

(Tr. p. 319, l. 3 to p. 320, l. 15)

* * *

Q. That was one of my other questions. A We continued to ship on into the fall to complete projects that were started, yes, sir.

Q. But, we don't have accurate records to show—
A. (Interjecting) I have no records after what is in that diary.

Q. So that up to the period ending April 30, 1978, we have an accurate record of cars you ordered at Kalo prior to the landslide and cars you ordered at the Fort Dodge to be placed at the Fort Dodge team track after the landslide? A. To the best of my recollection that would be correct.

Q. After April 30, you again were ordering cars and receiving cars at the Fort Dodge team track? A. Yes, sir.

Q. Did you receive those cars which you ordered to allow you to ship out all of your inventory of brick? A. I couldn't say that we shipped it all out by rail, no, sir.

Q. How was it all shipped out? A. Yes. We disposed of it, I believe.

Q. You did sell all of your brick? A. Basically in its entirety, yeah.

Q. You basically sold all of your brick inventory? A. Uh-huh (Yes).

(Tr. p. 320)

Q. And shipped it through some means? A. That's right.

Q. Did you— Did that brick—were you forced to take a lower price for that brick? A. That I can't answer. I don't—much of it had been prior—sold prior to the—much of the brick that we shipped after the landslide had been sold prior to the landslide and the price would not have deteriorated on it, no.

Q. So you were shipping to fulfill contracts that you already had? A. That's true.

Q. And certainly on those you were then receiving the same price for the brick? A. That is correct.

• • •

(Tr. p. 321, l. 17 to p. 322, l. 2)

• • •

Q. In other words, some of your shipping would have been local? A. Correct.

Q. And that wouldn't—you wouldn't have intended to ship that by rail anyway? A. No, sir.

Q. Basically, you shipped long haul rail and short haul truck? A. Basically we shipped the majority of our products by rail. The product that went to our distributor, the local product and the product within the

(Tr. p. 322)

State of Iowa, I could say would have been shipped by truck.

(Tr. p. 325)

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MAURICE REID,

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DIRECT EXAMINATION

BY MR. JOHNSON:

Q. State your name, please? A. Maurice Reid.

Q. What is your present position with the Chicago and Northwestern Transportation Company? A. I am assistant chief engineer administration.

Q. Mr. Reid, would you please summarize to us your qualifications and experience in the field of railroad engineering? A. Yes, sir. I started to work on a part-time basis for the Chicago and Northwestern in 1935 and worked intermittently for them during the time I was in school. Until I graduated from Iowa State University in 1940 with a BS degree in civil engineering. At that time I returned to the Chicago and Northwestern and have worked for them full time since that date in—except for three years spent in the United States Army as an officer in the

(Tr. p. 326)

transportation corp and engineering corp, spending two years in India operating railroads. I served various positions in the engineernig corp of the railroad, such as rodman, instant man, assistant engineer, division engineer in charge of a particular division, meaning that I had responsibility for the maintenance of the track, bridges, and other fixed property on three different divisions of the railroad. I was then promoted to engineer maintenance way for the Chicago and Northwestern system and shortly thereafter I was made assistant chief engineer in charge of maintenance. At that time my responsibilities involved the fixed property of the entire Chicago and Northwestern system, which included tracks, bridges, buildings and such as that. In 1969 I was made assistant chief engineering administration and I have been in that position since that date.

Q. Are you a licensed engineer in any state, Mr. Reid? A. Yes, sir. I am a licensed professional engineer in the State of Iowa and the State of Minnesota. I belong to a number of societies, engineering societies.

• • •

(Tr. p. 330)

EXAMINATION FOR PURPOSES OF OBJECTION,

BY MR. BLACKBURN:

Q. As I understand it, Mr. Reid, we are talking about the repairs to the M and St. L line, is that correct? A. Yes, sir.

Q. And that was in what year? A. As I had indicated the last time that went out and was not repaired was in the spring of 1967.

Q. When was it that you went out there and inspected it? A. It was subsequent to that date, but I don't have the record of the dates I was out there. I have been out there at least twice since then.

Q. Did you make any subterranean studies at that time? A. No, sir, I did not.

Q. Did you make any cost estimates at that time? (Tr. p. 331)

A. No detailed cost estimate although viewing it on the ground.

Q. Well, my question is, did you make any cost estimate at that time? A. No detailed cost estimate in our opinion at the time when we were discussing on the ground.

Q. If you will just respond to the question and not volunteer. Now, did you retain any engineering firm to make any estimates at that time or to make any examination of that area? A. I did not and I am not sure whether—I don't believe our people in the field did either for total estimate.

Q. You would be the man who would know if they did, would you not? A. For a total estimate, yes.

* * *

(Tr. p. 332)

MR. JOHNSON: Q. Mr. Reid, is the ground in the area of the M and St. L still moving downhill?

* * *

THE WITNESS: A. In the area the time element (Tr. p. 333)

that I was there, it is in my opinion, it appeared to be moving downhill.

MR. JOHNSON: Q. Are the soil conditions and the topography, the geological makeup of the ground in the M—in the area of M and St. L line the same as the soil conditions, topography and geological makeup of the area of the ground from the—in the area of the Fort Dodge, Des Moines and Southern line?

THE WITNESS: A. Yes, in general, I would say they were. In other words, they are both on side hills.

Q. Pardon? A. They are both constructed, the track, on sidehills, type of terrain.

Q. What about the components of the soil? A. Well, of course, it is all laid with clay in the area.

Q. Was gypsum mining carried on near the slopes that were adjacent to the old M and St. L line? A. Yes, sir.

Q. Did you observe while you inspected that line that these mining activities had any effect one way or another on slope movement in the area? A. Well, in my opinion they certainly could have because it placed considerable overburden over the natural soil in that area and, of course, this could put additional load on the soil in the area itself.

(Tr. p. 334)

Q. Now, after the Northwestern began serving Kalo Brick and Tile Company on the old Fort Dodge, Des Moines and Southern line, did they have a slide problem in '73? A. Yes, sir.

Q. And was that in April of '73? A. Yes, sir.

Q. Did you have an opportunity to inspect the slide problems on that line subsequent to April of '73? A. Yes, sir, I did.

Q. Do you think, Mr. Reid, that the slide problems on the Fort Dodge, Des Moines and Southern line could be repaired so that there would be a reasonable likelihood that they would not reoccur within the next week or the next day or the next month?

* * *

THE COURT: You may answer that yes or no.

(Tr. p. 335)

* * *

THE WITNESS: A. Yes, sir.

* * *

(Tr. p. 336)

* * *

MR. JOHNSON: Q. Okay. Mr. Reid, the Kalo line became impassable in 1973. Do you have an opinion on the basis of your observation of the line and on the basis of your experience as a railroad engineer concerning the

(Tr. p. 337)

cause of the problems with the roadbed that made the roadbed impassable? Yes or no.

THE WITNESS: A. Yes.

Q. What is that opinion? A. Well, the unstable soil condition which caused movement of soil that supposedly would support the track embankment and in

permitting the track to settle and move out of alignment.

Q. Is the unstable soil condition you are speaking about gravitational pull upon parts of the—upon the slopes or are you talking about slide movement or exactly what are you speaking about when you talk about unstable soil conditions? A. Well, we are talking about soil that has some pressure imposed upon it from above and laterally causing the soil itself to move.

Q. Have there been gypsum mining activities immediately west of the slope on the west side of the Fort Dodge, Des Moines and Southern line? A. Yes, sir, there have been.

Q. And have those mining activities had any effect, in your opinion, on the slope movement observable there? A. Well, I think the soil being generally unstable could have moved whether the mining activities were there or not. I think the mining activities could contribute to the movement of this soil and on this basis,

(Tr. p. 338)

yes, they could contribute somewhat to it by placing some overburden and also their method of excavation and so on.

Q. Mr. Reid, this is exhibit—Defendant's Exhibit W. This is the United States Department of Interior geological contour map which shows elevations of terrain. By reading that map can you tell the Court what that map indicates with regard to differing levels of elevation between the flow line of Gypsum Creek and the Fort Dodge, Des Moines and Southern roadbed? A. Well, in the near vicinity of the interchange track or the switch along the Fort Dodge, Des Moines and Southern, the flow line of the Gypsum Creek is from 30 to 40 feet below the track and the hill to the west approximates about 80 feet above the track.

Q. Okay. Thank you. Now, what area of the line were you talking about just then? A. This is trackage in the area of the switch leaving the Fort Dodge,

Des Moines and Southern track and interchanging with the M and St. L track. The point at where it left the—and connect with the Fort Dodge, Des Moines and Southern track.

Q. Mr. Reid, would you tell me again when you visited the Fort Dodge, Des Moines and Southern track and observed the slide areas? A. Well, I was in the

(Tr. p. 339)

areas as I mentioned in 1975.

Q. What time in 1975? A. September the 30th. I was also in this area this summer.

Q. Okay. Were you out there this morning? A. Yes, sir, I walked out there this morning.

Q. Now, if you were going to try to repair that line as I was talking about earlier, make repairs that would be of more than a temporary nature, what types of repair would you institute or recommend, if any? A. I would recommend that the entire slope to the west of the track or the hill to the west be partly removed so that you would have a much flatter slope from the track open area up to the higher elevations to the west. I would also recommend removing some of the material that the track sets on at this time and wasted and then bring in more suitable material for building a grade at that point.

Q. Are you familiar with the cost of performing these types of activity? A. The exact cost of this, I have not been involved in in recent—last few years. We have done similar things in years past.

Q. Okay. Would the lapse of time between April of '73 and your first outside inspection of the Fort Dodge, Des Moines and Southern line had made any substan-

(Tr. p. 340)

tial difference in the cost of instituting the types of repairs that you are talking about? A. No, not on the type of repair that would be somewhat permanent or what we consider or hope to be permanent.

Q. So even if the slide actions might have increased to some extent in that interim period, you are still faced with the same types of repairs, is that correct? A. Yes, sir.

Q. Now, Mr. Reid, I want you to assume that the cost of repairing—well, strike that. Mr. Reid, on the basis of your experience as a railroad engineer, and on the basis of your observations of the Fort Dodge, Des Moines and Southern line, do you have an opinion on what the cost of repair of making repairs which would have more than just a temporary nature would be to repair the slide problems as you observed them on your 1975 on site inspection?

MR. BLACKBURN: Yes or no.

* * *

(Tr. p. 341)

THE WITNESS: A. Yes, but only in general.

MR. JOHNSON: Q. And what is your opinion? * * *

MR. BLACKBURN: Object to that as being irrelevant and immaterial, remote in point of time. The witness is not qualified to answer the question and any answer would simply be led to conjecture and surmise based upon the record that's been made.

THE COURT: * * * The Court will permit the answer. The objection going to weight. You may answer.

THE WITNESS: A. Well, it would be well into six figures, but as I indicated, I have not—we have not made a detailed survey or taken estimate on the details of the cost, but just from experience of this type, it would be well into six figures.

MR. JOHNSON: Q. Do you have an opinion, Mr. Reid, on the highest amount that such repairs could run?

MR. BLACKBURN: Same objection.

MR. JOHNSON: Yes or no.

* * * (Tr. p. 342)

detailed cost studies made because of the expense involved, but I would like to know whether or not you can give us a range. I just need a yes or no answer on whether or not you have an opinion on the range of cost we might be talking about?

* * *

MR. JOHNSON: Q. And what is that opinion? * * *

MR. BLACKBURN: Same objection as last urged.

THE COURT: Same ruling. You may answer.

THE WITNESS: A. It would range in the neighborhood of all the way from half a million dollars up to two million dollars.

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(Tr. p. 349)

CROSS-EXAMINATION

BY MR. BLACKBURN:

Q. Right. Now, in your experience as a railroad engineer and your experience in maintenance, would you agree with me that it is not good maintenance practice to permit water to stand on the side of the track for an extended period of time? A. It is not good maintenance practice to do that.

• • •

(Tr. p. 358)

Q. Isn't it true that the Chicago and Northwestern Transportation Company never intended to make any repairs to the Shady Oak Transfer? A. At what point in time are you speaking of?

Q. In April of 1973 or at any time subsequent to that? A. We made no decision to that effect at that time, no, sir.

Q. My question is, they never ever intended to make any repairs to that, isn't that true?

• • •

THE WITNESS: A. We had never made a decision not to make the repairs.

MR. BLACKBURN: Q. You never made any esti-

(Tr. p. 359)

mate of the cost at that time? I am talking about April or at any time during 1973. There was no estimate of cost made, were there?

THE WITNESS: A. There was no detailed estimate of cost made.

Q. Precisely. No studies were made, were there? A. By studies, if you mean soundings and all of that at that time, no.

Q. In fact, you didn't even go out there until September of 1975, did you? A. That would not have been my job to have done that, sir.

Q. Well, you did go out there in September of 1975 to make the—why did you go out there in September of '75? A. I went out in September of '75 at that time to gather data and so on in connection with the proposed filing for abandonment?

• • •

(Tr. p. 360)

• • •

MR. BLACKBURN: Q. The point I am making, there was never any intention by the Chicago and North Western to repair this track no matter what it cost in 1973, was there?

THE WITNESS: A. No, I couldn't agree with that statement, sir.

Q. Well, no cost estimates were made, were there? A. No, sir, but that doesn't mean we decided not to repair it.

• • •

(Tr. p. 361)

Q. And insofar as any relief for Kalo Brick and Tile Company, the railroad just ignored the problem, did it not?

• • •

(Tr. p. 362)

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MR. BLACKBURN: I will add to that insofar as the repair of this 150 foot section of track was concerned?

THE WITNESS: A. I don't know as they ignored the problem, but they did not make repairs to this track.

Q. And they made no studies. Isn't that really the substance of your testimony? A. They made no detailed studies.

Q. And they made no cost estimates? A. Only general cost estimates?

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(Tr. p. 365)

RAYMOND E. SNYDER

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DIRECT EXAMINATION

BY MR. JOHNSON:

Q. State your name, please? A. Raymond E. Snyder.

Q. What is your present position with the Chicago and Northwestern Transportation Company? A. I am the director of the maintenance operations.

Q. Were you the assistant division manager of engineering with supervisory responsibilities for the Fort Dodge, old Fort Dodge, Des Moines and Southern line during April of 1973? A. Yes, I was.

Q. When did you assume that jurisdiction? A. The territory was transferred to me from the Iowa division in January of 1973.

Q. Are you familiar, Mr. Snyder, with a problem that occurred in the roadbed in April of 1973? A. Yes, I am.

Q. What was the nature of that problem? A. We had slide conditions that developed in the early part of '73 in March and in April, and in early April they became or they extended to the extent that we could no longer maintain safe rail passage over the trackage.

(Tr. p. 366)

Q. Do you know what day in April that was? A. I believe it was April the 4th.

Q. Of 1973? A. Of 1973.

Q. Did you personally inspect that line of railroad? A. Yes, I did.

Q. Approximately when did you make your first inspection tour? A. Between April 4th and April 15th, sometime in that area.

Q. And did you communicate with any of your superiors after that? A. Yes. I talked first on the phone with the assistant vice-president of engineering and then followed that phone conversation up with a letter. Subsequent to that I returned to the area with the division manager.

Q. About when was that, Mr. Snyder? A. That would have been between the 15th of April and the 24th or 25th of April.

Q. You returned with the division manager? A. Yes.
Q. Who was that? A. Mr. George Hansen. At that time we examined it, the area, and agreed that it would be impossible to continue train operations over the trackage as it was.
Q. Now, had that line been taken out of service prior to
(Tr. p. 367)
your first inspection tour? A. Yes, it had been taken out of service by the roadmaster, Mr. Ray Burks.
Q. Why was it taken out of service by Mr. Burks? A. Because he wasn't able to stabilize the alignment of the track.
Q. Were the tracks impassable? A. That's right.
Q. What did you advise—Well, excuse me. Strike that. Your experience with the railroad has been in the engineering department? A. That's correct.
Q. Is that correct. In—and your present position is what? A. Director of maintenance operations.
Q. And that's in the home office in Chicago? A. That's correct.
Q. Have you had experience in maintenance of roadbeds and repair of roadbed problems? A. Yes, I have.
Q. When you inspected this line on the two occasions in April of '73, how did you advise your superiors concerning the possibility of repair of the roadbed problems? A. Well, I advised them of the extent of the slide condition relative to the switch as well as relative to the trackage, the old interchange with the M and St. L and I also advised that I
(Tr. p. 368)
felt that soil samplings would be necessary to determine the extent of work necessary to put the line back in service.
Q. And what was the nature of the information that you conveyed to them? A. Well, that the cost of putting the line back in service would be in the six figure area.

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## III. DEPOSITION OF RAYMOND BURKS

(Depo. Tr. p. 2)

* * *

### DIRECT EXAMINATION

BY MR. BLACKBURN:

Q. Your name is Raymond Burks?

A. Yes.

* * *

Q. Are you still employed by the Chicago and North Western Transportation Company?

A. Yes.

Q. What are your present duties?

A. I am a roadmaster.

(Depo. Tr. p. 3)

Q. What does a roadmaster do?

A. He is in charge of track maintenance.

* * *

Q. Prior to that time, you were stationed at Fort Dodge, Iowa, is that correct?

A. Yes.

Q. Were you roadmaster there at Fort Dodge?

A. Yes.

Q. How long were you roadmaster at Fort Dodge?

A. About four years.

Q. Did you have the same duties at Fort Dodge that you have now?

A. Yes.

Q. In charge of track maintenance?

A. Yes.

Q. And that includes track repair, is that correct?

A. Yes.

* * *

(Depo. Tr. p. 4)

* * *

Q. (By Mr Blackburn) Who would have the records at the present time of track maintenance and repair for the period of time, say, from 1965 until 1973?

(Depo. Tr. p. 5)

A. It would be either one of two places. It would be Mason City or Boone.

Q. I see. Would those records include all orders for the repair and maintenance of track and right of way?

A. I really don't know if they would include all of them or not.

Q. I see. Well, are there—In your duties as roadmaster, would you receive written orders to repair before your undertook an extensive repair, ordinarily?

A. Ordinarily, in extensive costly projects, yes.

Q. And you would receive those from the division engineer, ordinarily?

A. Yes.

* * *

(Depo. Tr. p. 6)

Q. As roadmaster, did your duties include a periodic inspection of the track on the Kalo line?

A. Yes; as warranted, yes.

Q. How often would you make an inspection down there, roughly?

A. Probably twice a year, at the most.

Q. I see. Would that be between the period of time, say, from approximately—well, I guess during the four years that you were there, is that correct? Approximately twice a year for the four years that you were there, do you think?

A. No. Actually, on this particular line, I inspected it in April.

Q. April of what year?

A. That would have been '73.

Q. Did you ever inspect it before that time?

(Depo. Tr. p. 7)

A. No.

Q. Had you ever gone down on that stretch of line at any time prior to April of 1973?

A. Yes, I have.

Q. Do you remember the approximate times you went down there, by date?

A. Not by date, but it was in the fall of '72.

Q. In the fall of '72. What caused you to go down there on that occasion?
A. At that time, there was another gentleman that wanted to see the line, and we took a rail trip down.
Q. Who was that?
A. It was Mr. Gathman.
Q. Who is he?
A. He was a roadmaster.
* * *
Q. But you and Mr. Gathman went down in the fall of '72, is that correct?
A. Yes.
Q. At his request?
(Depo. Tr. p. 8)
A. Mutually.
Q. I see. What did you go down for?
A. He just wanted to show me some of the line, is all, and to just acquaint myself with it.
Q. When did you first come to Fort Dodge?
A. It was in March of '70.
Q. So from March of 1970 until the fall of '72, you hadn't seen this particular stretch of line?
A. That's correct.
Q. Was there any particular reason, other than Mr. Gathman wanting to show you that stretch of line, that you went down there? Was there a specific purpose in that?
A. At that particular time, it—I just wanted to see the railroad, and he wanted to go down it also.
* * *
Q. So from 1970 until the fall of 1972, you had not seen that particular stretch of line, and it didn't cause any particular problems? Is that basically correct?
A. Not to me.
Q. You mean it didn't cause any particular problems to you?
A. As a roadmaster, it did not?
Q. Was there anybody else that reported to you as
(Depo. Tr. p. 9)

roadmaster? The section foreman, and so forth, did they report to you?

A. Yes, they did.

* * *

Q. Now, getting down to the spring of 1973, is that the time that you recall that the service was discontinued to the Kalo Brick and Tile Company?

A. Yes.

Q. Would that have about April of '73 some time?

A. Yes.

Q. Did you have anything to do with that decision to discontinue service?

A. Yes.

Q. Can you explain to me how you were involved in that decision?

A. My foreman had discovered a crevice developing along (Depo. Tr. p. 10)
this line indicating a slack, of which he called to my attention, and we did inspect this, and at that time took the line out of service.

Q. Now, that was your foreman, Rex Parks?

A. Yes.

Q. What kind of a crevice was it?

A. It was just an opening that ran along where the bank came down, between the bank and the railroad, for approximately 150 foot.

Q. Was it cross-sectional to the railroad, or did it run with the railroad?

A. It was running parallel with the railroad.

Q. I see. This was in the spring of 1973, is that correct?

A. Yes.

Q. Was there any water impounded on the west side of the track at that time?

A. There was, yes.

Q. And that is about the place in the track where the crevice appeared? Is that substantially correct?

A. The crevice ran down near that area, yes.

Q. I see. Well, let me ask this question. Were there any blueprints of that track available to you when you were roadmaster there?

A. I had none, but I suppose they were available.
(Depo. Tr. p. 11)
Q. I see. Have you ever at any time before or since ever seen any blueprints of the track or plans of the —drawings of the track?
A. Yes.
Q. You have seen them since this time, is that what you are telling me, since April of '73?
A. Yes, I have.
* * *
Q. Do you recall when you looked at those blueprints whether or not there was a culvert under that railroad at the point where the water was impounded?
A. I don't recall seeing it on the prints, no, but—
Q. Did you have personal knowledge that there was a culvert there?
A. I was told there was one there, yes.
Q. Who told you that there was a culvert at that point?
A. It was either Jerry—one of the Jerrys at Kalo Brick and Tile.
Q. Either Jerry Schnurr or Jerry Kiliper would have told you that there was a culvert at that point?
A. Yes.
Q. Did they tell you this about the culvert prior to April of '73?
(Depo. Tr. p. 12)
A. No.
Q. I see. Now, was there some kind of an engineering study made about that time with respect to that—whether or not that was repairable?
A. I think there was one made.
Q. An engineering study?
A. I believe so.
Q. Do you know who made that?
A. I would imagine it would be Mr. Snyder's office.
Q. You went down there, did you not, with Jerry Kiliper and Jerry Schnurr at about that time, and I am talking in probably the second week of April of '73, somewhere between the 10th and 20th?
A. Yes.

Q. And you think there was an engineering firm who came out and made a study of it, is that your testimony?
A. I'm just not sure.
Q. I see. Well, if Ron Gibbons advised the people from Kalo that they had hired an engineering firm to look at the slide area, would that be substantially true?
A. I recall that they had contacted someone.
Q. But you don't know who the engineering firm was?
A. No, I don't.
* * *
(Depo. Tr. p. 13)
Q. A little bit ago, I think you—now, I might be misquoting you, and if I am, you correct me—but did you recommend that the line be taken out of service?
A. Yes.
Q. And you did this, I take it, without seeing this engineering report, if one was made?
A. Yes.
Q. This was a decision that you yourself made, is that correct?
A. Yes.
Q. Did you discuss it with anyone, any of your superiors?
A. After I made the decision, yes.
Q. Who did you discuss it with?
A. With Mr. Snyder.
Q. Would you tell me what the substance of that con-
(Depo. Tr. p. 14)
versation was, as best you can remember?
A. Yes. Mr. Snyder came to Fort Dodge and surveyed the line himself.
Q. Do you remember when that was? This was after you decided to take it out of service, I take it?
A. Yes. I would say within a week.
* * *
Q. Did you—I guess my previous question was—which you did not answer—would you tell me what the substance of that conversation was?
A. At that time, he agreed with me, due to the area that was involved, that until a study could be made, that was the feasible route to take.

Q. I see. Until a study could be made, and then was a subsequent study made?
A. I don't know.
Q. I see. At that time, what was the approximate distance that the track was impassable, and I am talking about the time, say, April 19, 1973?
A. I would guess about 300, 350 foot of it.
Q. When I asked you about an engineering study, you said that your recollection was that one was made.
A. We talked about it that day, that they would make one.
Q. I see. You don't have any recollection as to who made
(Depo. Tr. p. 15)
the study?
A. No.
Q. Do you know whether or not any soil samples were taken?
A. No, I do not.
Q. At least you weren't present there when any were taken, if there were any taken?
A. That's correct.
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Des Moines, Iowa, on the ....th day of ....., 1980.

/s/ B. Johnson